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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-735

PETER PANDILIDIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Petitioner, Peter Pandilidis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 24, 1975.

OPINION BELOW

The opinion of the Sixth Circuit, — F. 2d —, not yet reported, is reproduced herein as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 24, 1975. This petition is timely filed and jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. May a federal misdemeanor indictment which does not charge a crime be amended by a Bill of Particulars which adds the missing essential element of the crime purportedly charged in the indictment? [The Third Circuit and the Sixth Circuit are in direct conflict on this question. See *United States* v. *Goldstein,* 502 F. 2d 526 (3 Cir. 1974).]

2. Whether the rule set forth in *Larrison* v. *United States,* 24 F. 2d 82 (7 Cir. 1928) must be applied where a government rebuttal witness testifies falsely that the defendant's reputation among his neighbors and among the defendant's fellow members of the legal profession is not good, in circumstances where the defendant's credibility is crucial to his defense?

3. Whether a defendant, charged with willful failure to file a federal income tax return, is entitled to a jury instruction to the effect that the government must prove the defendant's "evil motive" beyond a reasonable doubt before a conviction can be returned.

4. Whether it is error to exclude from evidence the properly proferred fact that the two co-equal branches of the Internal Revenue Service disagreed as to whether the defendant was criminally or only civilly liable, thus creating a reasonable doubt as to defendant's guilt?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, provides, in pertinent part, as follows:

> No person shall be held to answer for a capital or other infamous crime, unless on a presentment or an indictment of a Grand Jury, . . .; nor shall any person be subject for the offense to be twice put in jeopardy of life or limb; . . ., nor be deprived of life, liberty or property, without due process of law; . . . .

The Sixth Amendment to the United States Constitution, provides in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and the cause of the accusation; . . .

26 CFR § 601.103 (b)

(b) Examination and determination of tax liability. After the returns are filed in the office of the district director of internal revenue or in the office of the director of a regional service center, they are sorted, classified, and processed. Many of these returns are selected for examination. If adjustments are proposed with which the taxpayer does not agree, he is ordinarily afforded certain appeal rights, including an opportunity to discuss the proposed adjustments (except mathematical errors) in a conference in the district director's office. If this conference results in agreement on the proposed adjustments, the taxpayer is requested to execute an agreement form. If the tax involved is an income, profits, estate, gift, or chapter 42 tax, and if the taxpayer waives restrictions on the assessment and collection of the tax (see § 601.105 (b)), the deficiency will be immediately assessed.

26 CFR § 601.104 (c)

(c) Enforcement procedure — (1) General. Taxes shown to be due on returns, deficiencies in taxes, additional or delinquent taxes to be assessed, and penalties, interest, and additions to taxes, are recorded by the district director or the director of the regional service center as "assessments". Under the law an assessment is prima facie correct for all purposes. Generally, the taxpayer bears the burden of disproving the correctness of an assessment. Upon assessment, the district director is required to effect collection of any amounts which remain due and unpaid. Generally, payment within 10 days from the date of the notice and demand for payment is requested; however, payment may be required in a shorter period if collection of the tax is considered to be in jeopardy. When collection of income tax is in jeopardy, the taxpayer's taxable period may be terminated under section 6851 of the Code and assessment of the tax made expeditiously under section 6201 of the Code.

26 U.S.C. § 6653 (d)

(d) No Delinquency Penalty if Fraud Assessed. — If any penalty is assessed under subsection (b) (relating to fraud) for an underpayment of tax which is required to be shown on a return, no penalty under section 6651 (relating to failure to file such return or pay tax) shall be assessed with respect to the same underpayment.

26 U.S.C. § 7203

WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made

under authority thereof to make a return (other than a return required under authority of section 6015), keep any record, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution.

STATEMENT OF THE CASE

On August 3, 1973, the Grand Jury of the United States District Court for the Southern District of Ohio, Western Division, indicted Peter Pandilidis, a Cincinnati attorney and the Petitioner herein charging in two counts the willful failure to file Petitioner's 1968 and 1969 income tax returns before April 15 of the following years in violation of 26 U.S.C. § 7203.[1] Since petitioner had obtained an extension to file the 1968 return until May 31, 1969 and had obtained an extension to file the 1969 return on or before May 30, 1970, he had no duty to file by the dates alleged in the indictment; the indictment thus did not charge Petitioner with the commission of a crime.

During pre-trial proceedings, the District Court permitted the government to amend the indictment by filing a Bill of Particulars which alleged the correct dates.[2] The

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[1] The opinion of the Court of Appeals incorrectly states that the indictment charged failure to file "before April 15 of each year." This statement is inaccurate, as the obligation is, and was so alleged, to file by April 15 of the *following* year.

[2] For the text of the Bill of Particulars, see page 2a, Opinion of Court of Appeals, in the Appendix.

case proceeded to trial by jury and on November 6, 1973 Petitioner was convicted on both counts.

At the trial, on the last day, the government offered the testimony of one Christopher F. Neely, an Episcopal priest and next door neighbor of Petitioner. Neely testified in clerical garb, as a rebuttal character witness and stated under oath that as a result of discussion with neighbors and with attorneys of Neely's acquaintance, his opinion of Petitioner's reputation among their neighbors, and among members of the legal profession generally, was that it was "not good". On cross-examination, Neely named four neighbors and their wives, and three attorneys, as the source of the opinions to which he had testified on direct pertaining to Petitioner's character and reputation.

Following the trial, Petitioner's attorneys interviewed the neighbors and the attorneys named by Neely and all but one of the nine persons named who were interviewed, including all three lawyers, denied the conversations with Neely, and denied that they had told Neely anything regarding Petitioner's character or his reputation in their respective groups. Affidavits were secured from one of the attorneys and two of the neighbors to that effect.[3]

Petitioner moved for a new trial relying on the "Larrison Rule" set forth in *Larrison* v. *United States,* 24 F. 2d 82, (7th Cir. 1928) and which had been adopted in the Sixth Circuit, *Gordon* v. *United States,* 178 F. 2d 896 (6th Cir. 1948).

At a conference in chambers, the District Court stated that Neely's false testimony was "too collateral." *"His reputation as a lawyer, so what? All lawyers reputations*

[3] The one neighbor who did indicate that she had communicated her negative impression of Petitioner to Neely also admitted that the source of her information regarding Petitioner was Petitioner's former wife, *and Neely himself!*

are bad . . ." The District Court further stated "but his reputation as a lawyer, so what's that got to do with this case? *His reputation for truth and veracity, really, what's that got to do with this case?* . . . . of course, if you could set aside a verdict for every lie told by the winning side, whether it be in the criminal or civil field, any lie, there never would be a case finished – an objective lie, now." [A. 146-8, Joint Appendix, Court of Appeals]

At the trial, the District Court excluded from evidence the properly proferred fact that the Internal Revenue Service Center had initiated collection procedures against Petitioner for the years in question, indicating that the Service Center considered Petitioner merely negligent, not criminally liable. When the fact was proferred, the Court stated: "so the proffer has been made and those matters will not be alluded to either in statement, evidentiarywise, or in argument." [A. 47 – Joint Appendix in the Court of Appeals].

The District Court omitted the phrase "evil motive" from the instructions to the jury on the definition of "willfulness" and the defense properly objected to the charge.

Thereafter, Petitioner was convicted on both counts, and was sentenced to 30 days imprisonment followed by eleven months probation.

REASONS FOR GRANTING THE WRIT

I. The United States Court of Appeals for the Third Circuit, in United States v. Goldstein, 502 F.2d 526, and the United States Court of Appeals for the Sixth Circuit herein, United States v. Pandilidis, — F.2d —, are in direct conflict on identical facts as to whether one may be lawfully convicted on a federal misdemeanor indictment to which a previously omitted essential element of the offense sought to be charged was added to the indictment by amendment.

For the first time in the history of this nation and its Constitution,[4] a federal appellate court has held that a federal indictment which does not charge a crime may be cured by an amendment which supplies the missing element. Petitioner is the "beneficiary" of this novel ruling. The decision of the Court of Appeals for the Sixth Circuit herein is in direct, absolute conflict with the decision of the United States Court of Appeals for the Third Circuit in *United States* v. *Goldstein*, supra.

The facts of the two cases are, for our intents and purposes, identical: in each case, the defendant was an attorney charged in a two-count indictment with willful failure to file federal income tax returns by April 15 of the year following each of the two taxable years involved; in each case the defendant had obtained an extension of the time to file each return, and consequently had no duty to file by the time alleged in the indictment; consequently, the

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[4] Other than in similar cases in which this Court has ultimately reversed the Court of Appeals. See *Russell* v. *United States*, 369 U.S. 749, *Silber* v. *United States*, 379 U.S. 717; *Stirone* v. *United States*, 361 U.S. 212.

indictment failed to charge an offense.[5] In each case, the District Court permitted the amendment of the indictment by the government, and in each case, the Court of Appeals held that the amendment was error.

The Circuits diverge in that the Third Circuit in *Goldstein* held the error to be so basic that automatic reversal was required. The Sixth Circuit adopted the position of the minority in *Goldstein* that the error was harmless under Rule 52 (a), Fed. R. Crim. Proc.

Both circuits agree that the fact that persons charged with misdemeanors in federal cases have no constitutional right to be indicted is immaterial, on the basis that the government derives substantial advantage from the grand jury process — discovery, and "that subtle, though undeniable stigma attached to a defendant who has been indicted by an impartial grand jury," *United States* v. *Goldstein,* 502 F2d at 531. In Petitioner's case, the advantage to the government was substantial — on the day the indictment was returned during the "Summer of Watergate" (when the reputation of the legal profession was at perhaps its lowest ebb) the fact of Petitioner's indictment was trumpeted through the media in the Cincinnati area: IRS agents were "interviewed" on radio, reading prepared statements identifying Petitioner, with his home address, profession and the amounts of income alleged to have been due thrown in for good measure. Petitioner's picture was shown on the television news, and articles appeared in the local press.

Later in this brief we quote IRS Commissioner Alexander at length: Field personnel were encouraged to "concentrate enforcement efforts on cases with maximum "pub-

[5] Under Crim. R. 12, a defendant may object to the failure of the indictment to charge a crime, or a lack of jurisdiction at any time.

licity potential . . . the purpose of criminal enforcement was to make an example of the offender." For this reason, the Third Circuit and the Sixth Circuit held the government, once it elects to proceed by the indictment process, is bound by the rules and principles governing indictments, *Goldstein,* 502 F.2d at 531, *United States* v. *Pandilidis,* p. 4a, *United States* v. *Fischetti,* 450 F.2d 34 (5 Cir. 1971).

A. The Jurisdictional Question.

The *Goldstein* case was first presented to the Court of Appeals herein at oral argument by Petitioner's counsel, who had been informed of the case by government counsel that morning. The presiding Judge requested of the parties a supplemental brief on the subject of the jurisdiction of the District Court under the original indictment, the effect of the amendment on jurisdiction, and whether the amendment should have been permitted. The jurisdictional aspects are not discussed in the opinion below; indeed, the word "jurisdiction" appears nowhere therein.

In a criminal case, "jurisdiction" is the power of the Court to inquire into the facts of the case, to apply the law, and to declare the punishment where the accused has been found by the trier of the fact to have committed acts declared by the law to be criminal. Ordinarily, a formal accusation which charges each element of a crime defined by law is essential to a prosecution because without that sufficient accusation, the Court has acquired no jurisdiction to proceed, even with the consent of the accused. 22 CJS *Criminal Law Sections* 107, 143, pg. 298, 380.

Where the indictment or information fails to charge a crime, the Court has obtained no jurisdiction of the subject matter, and, while it may have jurisdiction, or at least possession, of the person of the Defendant, it is power-

less to proceed. In this connection, the opinion of Justice Brandeis speaking for the Supreme Court in *Albrecht* v. *United States,* 273 U.S. 1, 8 (1927), is instructive:

> A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the Court . . . . when there was an appropriate accusation either by indictment or information a Court *may acquire* jurisdiction over the person of the defendant by his voluntary appearance. (Emphasis supplied).

Earlier, the United States Supreme Court, in *Ex Parte Bain,* 121 U.S. 1 (1887), stated that an indictment found by a Grand Jury is indispensible to the power of the Court to try an accused for the crime with which he is charged. That decision further held that where the indictment fails to charge a crime, the trial court is without jurisdiction of the subject matter of the offense.

Here, the indictment charged Petitioner with willfully failing to observe the legal duty to file his 1968 return by April 15, 1969 and his 1969 return by April 15, 1970. However, he had no such legal duty because of the six weeks extension for each of the years in question. An essential element to the charge of failing to timely file a return is the allegation of a duty to do so. If there is no duty to file, failure to file is not a crime. As the Third Circuit said in *Goldstein, supra*:

> There was no duty imposed on the Defendant to file a return before April 15, and an indictment alleging an offense in failing to submit a return on April 10, for example, *would not state a crime.* An omission to perform an act by April 15, is designated a criminal offense, but only on that date does the crime occur (Emphasis supplied).

The Court of Appeals herein agreed with the contention of Petitioner that the indictment was fatally defective. The Court of Appeals below stated:

> Since a crime is committed under 26 U.S.C. § 7203 only if Defendant fails to file a return on the date established by statute . . ., time is an essential element of the offense and any change in the date as charged is a substantial variation.

The indictment failing to charge a crime, the District Court was without jurisdiction to proceed further—lacking even the power to permit the amendment.

B. The Prohibition Against Amendment.

The federal doctrine that an indictment which omits an essential element of a crime does not charge a crime nor confer jurisdiction, and the doctrine that an indictment cannot be amended, have their roots in *Ex Parte Bain,* supra, in which Mr. Justice Miller, speaking for the Court, stated in relation to the amendment of the indictment by the trial court:

> . . . The indictment on which he was charged was no indictment of a Grand Jury. . . . After the indictment was changed it was no longer the indictment of the Grand Jury who presented it.
>
> It is of no avail, under such circumstances, to say that the Court still had jurisdiction of the person and of the crime, for, though it has possession of the person, and would have jurisdiction of the crime if it were properly presented by indictment, *the jurisdiction of the offense is gone,* and the Court has no right to proceed any further in the progress of the case for want of an indictment. (Emphasis supplied).

The Supreme Court, citing the same language from *Bain,* reaffirmed that rule in 1960 in *Stirone* v. *United States,* Supp. and again in 1962 in *Russell* v. *United States,* supra.

In *Stirone,* Mr. Justice Black, in his opinion for the Court, relied on *Bain* and on *United States* v. *Norris,* 281 U.S. 619; Justice Black stated:

> The *Bain* case, which has never been disapproved, stands for the rule that a Court cannot permit a defendant to be tried on charges that are not made in the indictment against him (Citations omitted). Yet, the Court did permit that in this case. . . . Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. . . .' while there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the Defendant's substantial right to be tried only on charges presented in the indictment, returned by a Grand Jury. *Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error* (Emphasis supplied).

In *Stirone,* as here, there was no allegation of a material fact which was necessary to give the Court jurisdiction and to allege a crime.

To permit the federal government to do what the Sixth Circuit would permit here — to gain all the advantages of grand jury proceedings and to retain the power to undo or change the grand jury's end product, the indictment — would be to permit the dilution and perversion of the grand jury process by a governmental agency which, by the admission of its Director, concentrates its efforts on only one segment of society — those with maximum publicity potential. Were this a state rather than a federal proceeding, interesting equal protection aspects

would be involved. Yet fundamental fairness would seem to dictate that the government exhibit the respect due the institution of the grand jury and restore it to the role of a shield, rather than that of a sword. The fact that the charge herein is a misdemeanor should have no effect upon the obligation of the government to make only proper use of the grand jury.

C. The "Harmless" Error.

The Court of Appeals concluded that Petitioner's right to notice, to a fair opportunity to defend, and his freedom from double jeopardy were not infringed by the amendment to the indictment. The Court adopted entirely the reasoning of the *Goldstein* minority that since there was no Constitutional right to indictment, the vague harmless error rule, Rule 52 (a), must be applied to the interest which one indicted for a misdemeanor could claim — the right not to be held to answer for certain crimes except on presentment of an indictment.

There are several inconsistencies with the approach adopted by the Court below: first, what it has given to Petitioner with one hand, requiring the government to be bound by the rules governing indictments upon the election to proceed in the grand jury, it has taken away from Petitioner with the other hand by applying a rule never before successfully applied to materially defective indictments. Rule 52 (a). One wonders why the Court held the government to the rules pertaining to indictments in the first place.

Secondly, it ignores the decisions of this Court to the effect that material defects are jurisdictional, and amendment of such indictments is plain error, rather than harmless error, *Stirone* v. *United States,* supra., *Silber* v. *United States,* 370 U.S. 717.

Finally, the Sixth Circuit applies the harmless error rule to the wrong set of facts to jutisfy its conclusion: whether the petit jury was shown by the record to have been influenced by the fact that Petitioner was indicted by an impartial grand jury. We submit that the only way such a fact could be shown would be to interview each juror *on the record* after the verdict — a course prohibited by local rule, as the District Court rules prohibit counsel from interviewing jurors following a verdict.

The Third Circuit applied the proper test to determine prejudice. To that Court the proper question was whether the grand jury would have returned the indictment at all given the correct facts: the extension of time for filing the return. The test applied was "whether there is reasonable assurance *from the face of the indictment* that the grand jury found probable cause on each of the essential elements which underlie the verdict of the petit jury." 502 F.2d at 529 [Emphasis supplied].

The simple answer is, of course, "no," for the equally simple reason that it is apparent that the grand jury was not informed of the extension.

Yet the Third Circuit was not content with the simple answer, and convincingly explores further: that Court correctly found that one of the "crucial" factors which is required to criminalize the act of filing a tax return late is willfulness — that state of mind characterized by a "bad purpose or evil motive." This Court has held in *United States* v. *Bishop,* 412 U.S. 346, that without such *mens rea,* one could not be convicted of willfully violating the federal tax laws. In *Goldstein,* as here, the grand jurors, "in focusing on the critical elements of knowledge and bad faith, . . . weighed state of mind on the wrong day and in the wrong circumstances. . . . Ob-

viously, the government would have had a heavier burden to establish willfulness and knowledge as of May 7 [Or May 30, 1969 and May 31, 1970 in the instant case] than it would have had for April 15 . . . in the absence of an extension."

One's state of mind can be in far different condition on May 30 or 31 than it is on April 15. It was in this area that the Sixth Circuit should have explored. The conclusion would have been inevitable — the grand jury had no information as to Petitioner's state of mind on the dates when the tax returns were actually due, and no indictment would have been returned.

The Sixth Circuit thus erred:

[1] In not finding that the District Court lacked jurisdiction;

[2] In permitting the amendment to add a missing element of an indictment — something only Congress or this Court has the power or right to do;

[3] In misapplying the harmless error rule. There is no basis for the implicit conclusion of the Court of Appeals that the grand jury, had it been aware of the extensions, would have indicted Petitioner without more information — which no one can possibly know.

Petitioner is in the unfortunate circumstance of living in the State of Ohio, which is part of the Sixth Circut. If Petitioner lived in any of the Third Circuit states, he would today be free of any judicial restraint. His right to practice law would be unimpaired.[5] The regrettable situation which has arisen from the decision below is that persons convicted under the circumstances

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[5] Ohio is the only state to our knowledge which requires a minimum two year indefinite suspension from the practice of law upon conviction of willful failure to file a Federal Income Tax Return. See *Columbus Bar Association* v. *Dixon*, 40 Ohio St. 2d 76.

herein in the Third Circuit have their convictions reversed and are once again free; persons convicted in the Sixth Circuit have their convictions upheld and must pay the penalty prescribed by Law, and in the case of Petitioner, an Attorney, a much great penalty: The deprivation of the right to practice his profession for two years.

This Court is respectfully urged to grant the writ of certiorari so that it can review this case and resolve the conflict between the two circuits.

II. A National Standard Is Necessary To Assist The Lower Courts In Determining the Rights of Criminal Defendants Who Allege That Their Convictions Result From False or Perjured Testimony of Material Government Witnesses.

Under the Rule set forth in *Larrison* v. *United States,* supra., a new trial based on false or perjured testimony by a material government witness will be granted if three requirements are met:

(a) The Court is reasonably well satisfied that the testimony given by a material witness is false.

(b) That without the false testimony the jury *might* have reached a different conclusion.

(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it for it did not know of its falsity until after the trial.

The *Larrison* Rule has been adopted in many Circuits, including the Sixth, *Gordon* v. *United States, supra.* It is quoted as the proper rule in 8A *Moore's Federal Practice,* ¶ 33.06 (1), and by Professor Wright, with approval, in Wright, *Federal Practice and Procedure,* § 557. While

occasionally cited in this Court, it has never been specifically adopted as the governing principle in situations in which it applies.

The Court of Appeals gave Petitioner short shrift on this point in its opinion [7a-8a], holding only that the District Court found that the "newly discovered evidence" did not concern a material issue, and did not require a new trial. Yet Petitioner established that each of the elements of the *Larrison* Rule had been fulfilled. The Court of Appeals' decision on this question is consequently contrary to law.

A. The Materiality of the False Testimony.

Petitioner had denied that his failure to timely file the returns in question was willful; he presented character evidence in his behalf, to bolster his credibility. Neely testified falsely that Petitioner's reputation in his neighborhood and among his brother lawyers was "not good." Neely was the only government withness called to rebut Petitioner's character evidence. The government has insisted on appeal that Neely's testimony was too collateral — yet the government did not seem to think so at the trial, as when it argued to the jury, fully nine pages of argument are devoted to attacks on Petitioner's credibility, including recitals of Neely's testimony [A. 123, R. 300-310, 351].

To be material, perjury or false testimony does not have to go to the ultimate issue of guilt or innocence. A new trial will be granted if the false testimony is material to punishment, *Brady* v. *Maryland,* 373 U.S. 83 (1963), or to the credibility of the witness, *Napue* v. *Illinois,* 360 U.S. 264 (1959). In *Napue,* this Court said:

> It is of no consequence that the falsehood bore upon the witness *credibility* rather that directly upon the defendants' guilt. A lie is a lie, no matter what its subject."

Here, of course, the false testimony went to the defendant's credibility, which was the only basis for his defense: that he could be believed when he denied that his failure to file on time resulted from the bad purpose or evil motive that this Court has held must form the basis for a conviction under 26 U.S.C. § 7203, *United States* v. *Bishop,* 412 U.S. 346.

Further, this Court has held that character is relevant in determining probabilities of guilt, *Michelson* v. *United States,* 335 U.S. 469 (1952). In a tax case, the Tenth Circuit has stated:

> "In a case such as this where the defendant admits understatement of income and *defends solely on the lack of willful intent, the character of the defendant is an important element, Peterson* v. *United States,* 268 F.2d 87 (10th Cir. 1959, emphasis supplied).

If Napue was entitled to relief on the limited facts of that case, under these facts, Petitioner is doubly so entitled. Clearly, the false testimony was material, and the decision of the Courts below was contrary to law. In *Mesarosh* v. *United States,* 352 U.S. 1, this Court stated that the dignity of the United States government will not permit the conviction of any person on tainted testimony. In that case, a new trial was ordered even though there was no evidence that the witness committed perjury at the trial but only because the witness perjured himself at an unrelated hearing three months after the trial in question. In fact, the District Court relied inexplicably on *Mesarosh* in denying Petitioner's motion for a new

trial. That reliance was misplaced because the newly discovered evidence here was of perjury *at the trial,* not later, as in *Mesarosh*. Petitioner was even more prejudiced than was Mesarosh.

B. The Remaining Elements of Larrison Are Established By The Facts.

The preceding analysis has been devoted to the element of materiality because the Courts below relied on absence of materiality of the false testimony in their denial of Petitioner's claim that he was entitled to a new trial, or at least to a hearing on the motion. The other requirements of the *Larrison* Rule are present in abundance.

There is no question that the evidence was false. Nine of the eleven persons named by Neely as the source of his opinion of Petitioner's character were interviewed, including all three attorneys. Eight of those denied the statements imputed to them by Neely as forming the basis of his testimony, and the ninth allowed that her negative impression of Petitioner came from Neely himself! Three of the nine executed affidavits, including one of the attorneys, all of which were submitted to the District Court.

That the jury "*might* have reached a different conclusion" is not open to question. Neely testified in full clerical garb, and remained in the courtroom until the jury was sent in to deliberate. He was present when the verdict was returned. The impact of a priest in clerical garb testifying that the defendant's reputation among his brother lawyers was not good can scarcely be underestimated, and, as stated previously, the government attacked Petitioner's credibility incessantly in argument, citing the

testimony of the priest, who even then was in the courtroom.[6]

Further, the final test of *Larrison* is met by the fact that Neely testified on the last day of the trial, his subpoena having been issued the afternoon before, only 18 minutes before the afternoon session. Unlike every other witness, Neely did not wait in the witness room adjacent to the courtroom, but in the United States Attorney's office on another floor in the building. The government and the Courts below felt that since it was *possible* for the defense to ascertain Neely's identity, that the defense could have met the challenge posed by the testimony. But knowledge of the identity of a witness is not tantamount to knowledge of the content of the testimony, and of the further fact that the testimony will be false. The falsity of the testimony was not ascertainable until after the trial.

It is perhaps true, as has been suggested, that Petitioner could have asked for a delay to subpoena the persons named by Neely (one of whom was then in Australia). Yet Petitioner did not know any of the neighbors nor the attorneys. He had no way of knowing that the statements attributed to them by Neely were not made. Had Petitioner obtained a continuance to subpoena witnesses who, for all he knew, might confirm Neely's testimony, he might have buttressed the case against him, as they would then have been available for use by the government. The due process clause does not, we submit, require a criminal defendant to make such a Hobson's choice.

The presence of the prerequisites of the operation of the *Larrison* Rule are clearly present here. The Courts below seem to have overlooked the *Larrison* Rule en-

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[6] As to the effects on a criminal jury of inadmissible but damaging evidence, see *Psychology Today*, May, 1974, "How Not to Get a Fair Trial," p. 86.

tirely, despite the fact that the Sixth Circuit had adopted the rule in 1948.

The acceptance of this question for review will give this Court not only the opportunity to correct a manifest injustice inflicted on Petitioner; it will provide the opportunity for the national application of a sound rule of law, the *Larrison* Rule, in all federal cases to which it applies.

III. The District Court deprived Petitioner of due process of law by failing to charge the jury on the definition of "willfulness" in accordance with United States v. Bishop.

The correct deflnition of "willfulness" as meant by Congress in the enactment of the Internal Revenue criminal offenses has been the subject of almost constant litigation in the Federal Appellate Courts.

Recently, in *United States* v. *Bishop,* 412 U.S. 346 (1973), the Supreme Court of the United States defined "Willfulness" in accordance with the definition first enunciated in *United States* v. *Murdock,* 290 U.S. 389 (1933): "Until Congress speakes otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "willfully," the bad purpose or evil motive described in *Murdock,* supra." 412 U.S. at 361.

In the instant case, the District Court charged the jury:

> "A failure to act is willful if it is voluntary, purposeful, deliberate and with specific intent to fail to do what the law requires." And later, "In order for an act or failure to act to be willful it must be done with a bad purpose to disobey or disregard the law." (A. 128).

Nowhere in the instructions was the jury told that willfulness incorporated an "evil motive."

Jurors are, in the ideal and in the abstract, a cross section of their community. Some are educated and some are not, some are literate, others barely so. The Supreme Court thought it sufficiently important to include the phrase "evil motive" in the definition of willfulness so that an element of *mens rea* would be present to implement "the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." *United States* v. *Bishop,* supra.

To the average person, the phrase "evil motive" obviously means something more than "bad purpose." The word "evil" has a connotation of something much worse than something which is merely "bad." One may speak of a "bad child," a phrase frequently heard in everyday conversation. Yet so much more emphatic, and rarely heard, is the reference to an "evil child."

While it may seem to some a mere play on words, it is submitted that the omission by the Court of the phrase "evil motive," which omission was promptly and properly objected to by defense counsel, prejudiced the right of the defendant to have the jury instructed as to the extent of the criminal intent required to find that the defendant's failure to file timely returns was willful.

IV. The District Court Violated Petitioner's Right to the Due Process of Law by eliminating defense use of inconsistent positions taken by the Internal Revenue Service for Any Purpose, Including Impeachment.

During the IRS investigation of Petitioner's late filings of his 1968 and 1969 income tax returns, the government took two contradictory positions: that of the Internal Revenue Center in considering the late filings as negligent, and assessing penalties and initiating collection procedures; and that of the District Director, through the Intelligence Division, in pursuing a criminal indictment for willful failure to file the returns for the years in question.

On August 14, 1974, Internal Revenue Commissioner Donald C. Alexander, the nation's chief IRS official, confirmed that policy in remarks to the Tax Section of the American Bar Association at their convention in Honolulu. Stating that he was changing several long-standing IRS policies, he said:

> For example, the Service has had a long-standing policy which encouraged field personnel to concentrate enforcement efforts on cases with maximum "publicity potential", and stated, in part, that the purpose of criminal enforcement was to make an example of the offender.
>
> . . . .
>
> Along the same line, our own fascination with the Service's image as a "law enforcement" agency began to affect the manner in which we applied certain of our enforcement policies. For example, a *long-standing IRS procedure cautioned against uncoordinated pursuit of civil enforcement actions where a criminal enforcement action was pending.* The original purpose of this policy was to avoid accidentally im-

> periling the criminal prosecution potential in such circumstances. (Emphasis supplied.)

Commissioner Alexander went on to say that these policies would be changed in the near future.

The foregoing indicates that, at the times involved herein, there was a "long-standing" policy that civil collection of taxes was not to proceed where criminal action was contemplated. IRS Agent Pater recognized as much in recommending the Form 4135 to forestall collection activity. It must be assumed all other IRS agents were aware of the policy as well, and that since collection activity proceeded apace with the criminal investigations, that the Service Center personnel were of the opinion that Petitioner's liability, such as it was, was civil, not criminal.

The defense desired to use this inconsistency at the trial, hoping that since two coequal branches of the same governmental department treated the identical acts of the defendant differently, one civil, the other criminal, that a reasonable doubt was necessarily raised as to whether, in fact, Petitioner's actions were criminal. The matter was discussed at a pretrial conference on October 18, 1973 (which was recorded and transcribed, and constitutes part of the record herein), was the subject of a trial brief, and formed the basis of a proffer during the trial itself [A 37-41]. At the conclusion of the proffer, the Court said: "So the proffer has been made and these matters will not be alluded to either in statement, evidentiarywise, or in arument." [A 47].

That there was an inconsistency is not open to question. Petitioner had been billed in March 1973, and again in May for his tax liability plus civil penalties for the 1968 and 1969 returns, by the Service Center, which

classified the returns as "untimely" as opposed to the fraudulent "willful failure to file." 26 U.S.C. § 6653 (d) specifically provides that no delinquency penalty is to be assessed where fraud is determined to be present. Since a delinquency penalty was assessed, the District Director, through the Intelligence Department was acting inconsistently with the position of the Service Center. The two branches are co-equals in these matters, 26 CFR §§ 601.103 (b), 104 (c). The inconsistency is further underscored by the testimony of IRS Agent Pater to the effect that he recommended referral of the matter to the Intelligence (criminal investigative) Division, "and that Form 4135 be initiated at once to forestall any solicitation of returns or collection activities for the years '68 and '69." [R. 56-57].

In support of its decision forestalling use by the defense of this inconsistency, the District Court relied upon *United States* v. *Santos,* 372 F.2d 177 (2nd Cir. 1967) and *United States* v. *Powers,* 467 F.2d 1089 (7th Cir. 1972).

Yet *Santos* did not go so far as to say that inconsistencies on the part of the government could never be used for any purpose, as the District Court held here. Even *Santos* acknowledges that a prior inconsistent statement can be used for the purpose of cross-examination to impeach a government agent. *Yet even that limited use was denied to Petitioner by the elimination of that inconsistency for all purposes.* In *Transmississippi Corp.* v. *United States,* 494 F.2d 770, (5th Cir. 1974) a similar use of an inconsistent statement for impeachment purposes was upheld.

In *Powers,* the Seventh Circuit indicated that *had the defendant made a record by proffer,* to show that the government had prosecuted two separate individuals for

separate receipt of the same funds, "then notwithstanding the implications of cases such as *United States* v. *Santos* . . . *we might have to give serious consideration* to whether the offer of proof should not have been sustained on the basis, at the very least, that it concerned judicial admissions of the government." 467 F.2d at 1093.

Santos dealt with inconsistent statements of government agents. *Powers* with inconsistent positions of a governmental department. Judge Stevens, dissenting in *Powers,* stated that *Santos* is transcended when "the sovereign itself takes inconsistent positions . . . the fact of the inconsistency may properly be brought to the attention of the jury and the government put to the burden of explaining how it could argue that the same transaction can prove, beyond a reasonable doubt, two mutually exclusive propositions."

In the instant case, a proper proffer of the inconsistency was made. The *Powers* case would seem to require, in such a case, the abandonment of *Santos* and proceeding along the lines suggested in the dissent.

Yet the District Court treated *Santos* and *Powers* as preventing any use of such inconsistencies *for any purpose.* What is involved here is more than a mere prior inconsistent statement by an individual who happened to work for the government; it involved two contradictory positions by two separate, but equal (in this area) divisions of the Internal Revenue Service. Whether *Santos* and *Powers* are interpreted as opening up the use of such inconsistencies for all purposes if a proper proffer is made (as was done here), or merely permitting the use of the inconsistencies to impeach individual agents while testifying as government witnesses, the District Court, in prohibiting the use thereof by the defense *for either, or for any purpose,* deprived the defense of an important

tactic (in the case of use of the inconsistency for purposes of impeachment), and perhaps a defense as well. Had the jury been apprised of the inconsistency, Petitioner might have been acquitted. As Judge Stevens stated in his dissent in *Powers,* "[His] inability to bring this fact to the attention of the jury may well have been the critical difference between his conviction and his possible acquittal."

Consequently, there was indeed an inconsistency of positions not explained by the government's allegation of a computer malfunction. The inconsistency is permitted by law to be used by the defense in certain situations, and the refusal of the District Court to permit the defense to use it for any purpose constitutes a violation of due process of sufficient magnitude to require reversal.

The Court of Appeals acknowledged that "evidence of contradictory statements may be used to impeach a government agent." [Sixth Cir. Op. 8a]. Yet the opinion ignores the fact that Petitioner was denied even that right by the District Court's exclusion of the contradiction for any purpose. While Petitioner sought to use the contradiction as "evidence of the fact," and still feels that he has a right to so use the contradiction, the Court of Appeals decided (contrary to the very cases upon which it relies) that Petitioner could not use it for impeachment as well. Such a ruling is contrary to law.

CONCLUSION

The questions herein presented are important and significant. There is presently a conflict between the Third and Sixth Circuits which, if left unresolved, will result in different results in cases with identical facts. The problem is particularly acute in that in each Circuit there are many prosecutions for violations of 26 U.S.C. § 7203. The situation is not unusual; counsel is aware of one other indictment in which the defendant, also an attorney, was charged with violating 26 U.S.C. § 7203 as of April 15 of the year following the taxable year, and for which year he had obtained an extension. That indictment was dismissed as part of a plea bargain; yet there must be innumerable other cases where defective indictments were returned. The conflict should be resolved so that once again there is uniformity in the application of the law in the respective Circuits. This case affords the opportunity to do so.

The other questions are also significant and important, not only to Petitioner, but to the public and the legal profession. They also deserve review. The Court is respectfully urged to grant certiorari and reverse Petitioner's convictions.

Respectfully submitted,

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APPENDIX

No. 74-1817

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. PETER PANDILIDIS, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed October 24, 1975.

Before: CELEBREZZE, Circuit Judge; McCREE, Circuit Judge; *DEMASCIO, District Judge.

DEMASCIO, District Judge. On August 3, 1973, a grand jury returned an indictment charging the defendant with failure to file his 1968 and 1969 federal income tax returns on or before April 15 of each year.[1] in violation of 26 U.S.C. § 7203.[2]

* The Honorable Robert E. DeMascio, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

[1] Count I of the indictment charged in part that the defendant ". . . during the calendar year 1968 . . . by reason of such income he was required by law, following the close of the calendar year 1968 and on or before April 15, 1969, to make an income tax return to the District Director of Internal Revenue . . . that well knowing all of the foregoing facts, he did willfully and knowingly fail to make said income tax return . . . ." Count II is identical except that it charges defendant with failing to file a 1969 return on or before April 15, 1970.

[2] 26 U.S.C. § 7203 provides as follows:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to

The April 15 date mentioned in the indictment was erroneous because appellant had received extensions to file his 1968 and 1969 returns until May 30, 1969 and May 31, 1970 respectively. At a pre-trial conference held on September 17, 1973, the government attorney informed defendant's counsel that he intended to correct the indictment by filing a "bill of particulars" reflecting such extensions. Thus, defendant's counsel was aware of the erroneous dates and agreed to the filing of the bill of particulars.[3] The bill was filed on September 21, 1973, and provides:

> I. With respect to Count I of the indictment, the United States intends to prove that the defendant, Peter Pandilidis, requested and received from the Internal Revenue Service an extension for filing his 1968 income tax return. The extension required him to file that return on or before May 31, 1969. The United States intends to prove that he did willfully and knowingly fail to make said income tax return.
>
> II. With respect to Count II of the indictment, the United States intends to prove that the defendant, Peter Pandilidis, requested and received from the Internal Revenue Service an extension for filing his 1969 income tax return. The extension required him to file that return on or before May 30, 1970. The United States intends to prove that he did willfully and knowingly fail to make said income tax return.

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make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

[3] This "agreement", however, did not constitute a waiver of indictment because it was not made by the defendant in open court. See Fed.R. Crim.P. 7(b).

Thereafter, the defendant proceeded to a jury trial on November 6, 1973, and was convicted on both counts.

On appeal, the defendant raises several allegations of error. The most substantial issue, first presented at oral argument before this court, compels us to decide whether an indictment for a misdemeanor may be amended prior to trial by filing a bill of particulars to correct a material allegation.[4]

The filing of the bill of particulars effectuated an amendment to the indictment. Ordinarily, an indictment may be amended only by subsequent action of the grand jury. *Stirone* v. *United States*, 361 U.S. 212 (1960); *Ex parte Bain*, 121 U.S. 1 (1887). This rule, constitutional in origin, has developed within the context of the Fifth Amendment, which protects an accused from prosecution for high crimes except upon charges filed by a grand jury. In both *Stirone* and *Bain*, the Supreme Court concluded that effectuation of the Fifth Amendment protections required the preclusion of substantial variations in an indictment unless approved by a grand jury. "Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney. . . ." *Ex parte Bain, supra* at 13. While a mere change in date is not normally considered a substantial variation in an indictment, where the date of the alleged offense affects the determination of whether a crime has been committed, the change is considered material. Since a crime is committed under 26 U.S.C. § 7203 only if the defendant fails to file a return on the date established by statute, regulation

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[4] Generally, the sufficiency of an indictment must be tested by pre-trial motion pursuant to Rule 12(b), Federal Rules of Criminal Procedure; *Gaither* v. *United States*, 413 F.2d 1061, 1072 (D.C. Cir. 1969); *United States* v. *Doelker*, 327 F.2d 343 (6th Cir. 1964); *United States* v. *Norman*, 391 F.2d 212 (6th Cir. 1968). However, we consented to decide the issue even though a pre-trial motion challenging the validity of the indictment was never filed.

or administrative action, time is an essential element of the offense and any change in the date as charged is a substantial variation. *United States* v. *Goldstein*, 502 F.2d 526 (3rd Cir. 1974). Thus, the Fifth Amendment prohibits, other than by grand jury action, the changing of a date in a felony indictment where the date is an essential element of the offense. While this defendant was convicted of a misdemeanor that could have been prosecuted by information as well as by indictment, we agree with the defendant that even in misdemeanor cases, once the prosecution elects to proceed by indictment it must follow the rules developed to govern use of indictments. *United States* v. *Fischetti*, 540 F.2d 34 (5th Cir. 1971), *cert denied*, 405 U.S. 1016; *United States* v. *Goldstein*, 502 F.2d 526 (3rd Cir. 1974); Fed.R.Crim.P. 7(e). Accordingly, it is apparent that the district court erred in permitting amendment to the indictment by filing a bill of particulars. The isue we must resolve is whether the rule of automatic reversal required when an essential element of a felony indictment is amended other than by grand jury action should be extended to an indictment charging a misdemeanor or whether convictions for misdemeanors charged by a subsequently amended indictment should be evaluated in light of the harmles error doctrine contained in Fed.R.Crim.P. 52(a).

The Third Circuit recently resolved this issue against the government in *United States* v. *Goldstein, supra,* where it concluded that even in misdemeanor cases, in which indictments are not constitutionally required, any amendment to an indictment without grand jury action must result in automatic reversal. This conclusion was based on a finding of *per se* prejudice to a defendant prosecuted by an indictment that is subsequently amended. The court noted that prejudice to a defendant necessarily follows an amendment to an indictment because the government obtains distinct advantages from the indictment procedure; it benefits from discovery through the use of the grand jury process and from the possibility that a jury verdict might be subtly influenced by the fact that an

impartial grand jury found probable cause to charge the accused.[5]

It may be true that the government obtains an advantage by initiating prosecution by indictment. However, it does not follow that such an advantage should result in automatic reversal of the defendant's misdemeanor conviction. Rather, we think that reversal should take place only where the amendment of the indictment results in actual prejudice to any of the interests of the defendant protected by the indictment procedure.

The rules governing the content of indictments, variances and amendments are designed to protect three important rights: the right under the Sixth Amendment to fair notice of the criminal charge one will be required to meet, the right under the Fifth Amendment not to be placed twice in jeopardy for the same offense, and the right granted by the Fifth Amendment, and sometimes by statute,[6] not to be held to answer for certain crimes except upon a presentment or indictment returned by a grand jury. *Russell* v. *United States*, 369 U.S. 749 (1962); *United States* v. *DeCavalcanee*, 440 F.2d 1264 (3rd Cir. 1971); *United States* v. *Bryan*, 483 F.2d 88 (3rd Cir. 1973); *Gaither* v. *United States*, 413 F.2d 1061 (D.C. Cir. 1969). The rule preventing the amendment of an indictment should be applied in a way that will preserve these rights from invasion; where these rights are not threatened, rules governing indictments should not be applied in such a way as to defeat justice fairly administered.

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[5] We are troubled by the suggestion in *Goldstein* that a petit jury might consider a grand jury indictment as tending to prove a defendant's guilt. It is impermissible for a jury to infer guilt from the fact of an indictment or information. See Mathes & Devitt, *Federal Jury Practice and Instructions* § 806.

[6] In *Russell* v. *United States*, 369 U.S. 749 (1962), prosecution by indictment was not constitutionally required for the offense as charged. However, a statutory provision required prosecution only by indictment and that Court adopted a *per se* rule of reversal to protect this statutory right.

In this case, the first two of these interests were in no way infringed by the amendment to the indictment. The defendant's right to notice and fair opportunity to defend was not infringed, since he was made aware of the amendment well in advance of trial; neither was his freedom from double jeopardy infringed since the record was sufficiently detailed to protect him against a subsequent prosecution for the same offense. Thus, defendant's argument must stand or fall on the third interest protected by the indictment procedure, *viz*, the constitutional right not to be held to answer for certain crimes except upon a presentment or indictment. *United States* v. *Goldstein, supra* at 529.

Defendant argues that he suffered prejudice in that, since evidence of the extension was never submitted to the grand jury, an impartial group of citizens did not have occasion to consider whether there was probable cause to prosecute. However, this function "has *no relevance* to an indictment which is not constitutionally required." *United States* v. *Goldstein, supra* at 532 (Hunter, J. dissenting). The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." Since appellant was not charged with an infamous crime,[7] he cannot rely on the constitutional right to be convicted only after indictment by a grand jury. Neither did appellant, under federal law, have a statutory right not to be held to answer for a violation of § 7203 except upon a presentment or indictment.

If we found constitutional error, we would have to determine whether the interest protected was so substantial that

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[7] Infamous crimes are defined as those which can result in incarceration in a penitentiary. *Mackin* v. *United States*, 117 U.S. 348 (1886). The offense of failing to file a timely income tax return is not considered an infamous crime because the maximum sentence provided (one year) precludes incarceration in a penitentiary. See 18 U.S.C. § 4038: "A sentence for an offense punishable by imprisonment for one year or less shall not be served in a penitentiary without the consent of the defendant."

it could not be disregarded even if the error was "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). However, since the error permitting amendment to the indictment in this case did not reach constitutional dimensions, the appropriateness of reversal must be determined under Rule 52(a) Fed.R.Crim.P., which provides:

> "[A]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

In this case, the defendant has failed to identify any substantial rights affected by the amendment. It is apparent from this record that the defendant, himself an attorney, at all times knew that the date appearing in the original indictment was erroneous. The defendant was made aware in sufficient time prior to trial that the extended date for filing would be used. Moreover, the defendant, having consented to the filing of the bill of particulars, may not now assert surprise. Additionally, the defendant has not identified any evidence that the prosecutor may have gained through a grand jury proceeding not otherwise available from other sources. Nor can we find from this record any substantial likelihood that the jury's verdict was influenced by its awareness that an indictment had been returned by an impartial grand jury. The evidence of the defendant's guilt presented by the government was convincing beyond a reasonable doubt. Under these circumstances, we fail to see how prejudice could be identified. The error, therefore, did not affect any of the defendant's substantial rights and does not require reversal under Rule 52(a) Fed.R.Crim.P.

The defendant advanced three other objections on appeal. First, the defendant contends that the district court erred in denying his motion for new trial, which was based upon the submission of affidavits contradicting the character evidence of a government witness. The district court determined that the newly discovered evidence did not concern a material

issue and, therefore did not require a new trial. A motion for a new trial based on newly discovered evidence is addressed to the sound discretion of the district court. *United States* v. *Crowder*, 351 F.2d 101 (6th Cir. 1965). We cannot find that there was an abuse of discretion in denying the request in this instance. Second, the defendant contends that the district court erred by omitting the phrase "evil motive" in its instruction to the jury concerning the definition of willfulness. We have reviewed the jury instructions as a whole and find them clearly consistent with the guidelines set forth in *United States* v. *Bishop*, 412 U.S. 346 (1973). Finally, the defendant complains that the district court precluded the admission of evidence of actions taken by the Central Service Center of the Internal Revenue Service after defendant had filed his returns on February 18, 1971. The defendant sought to introduce this evidence, which the defendant thought demonstrated that an agent of the government believed the defendant guilty of no more than a civil offense, to establish that defendant was not guilty of the criminal offense with which he was charged. While evidence of contradictory statements may be used to impeach a government agent, they may not be introduced to prove the truth of the statements offered. *United States* v. *Santos*, 372 F.2d 177 (2nd Cir. 1967); *United States* v. *Powers*, 467 F.2d 1089 (7th Cir. 1972). *United States* v. *Santos*, *supra*, at 180 points out that:

> "[T]he inconsistent out-of-court statements of a government agent made in the course of the exercise of his authority and within the scope of that authority, which statements would be admissions binding upon an agent's principal in civil cases, are not so admissible here [against the government] as 'evidence of the fact.' "

The trial court was correct in excluding this evidence.

Accordingly, the judgment is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-735

PETER PANDILIDIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on two counts of wilfully failing to file timely federal income tax returns for 1968 and 1969, in violation of 26 U.S.C. 7203. The court sentenced him to concurrent one-year terms on each count, 11 months of which were suspended on the condition that he serve 30 days in a jail-type institution. The court of appeals affirmed (Pet. App. 1a-8a).

The relevant facts are as follows: During 1965-1967, petitioner was employed by the H & R Block Company as a preparer of tax returns (Tr. 14-18, 250-254).[1] During 1968 and 1969, petitioner practiced law in Cincinnati, Ohio. As part of his law practice, he prepared federal income tax returns for a number of his clients (Govt. Ex. 4).

[1]"Tr." refers to the trial transcript. "R." refers to the joint appendix filed in the court of appeals.

In a form filled out for the Cincinnati Bar Association, petitioner represented that he considered himself particularly qualified in the field of taxation (Tr. 44).

On April 14, 1969, petitioner applied for additional time within which to file his 1968 return (Tr. 116-117). In the application, petitioner falsely stated that he had filed timely returns for each of the preceding three years, when in fact he had not then filed his 1967 return. The Internal Revenue Service granted petitioner an extension of time to May 31, 1969, within which to file his 1968 return. Petitioner made no application for any further extension of time for the filing of his 1968 tax return (Govt. Exs. 3, 3A).

In late 1969 and in February 1970, the City of Cincinnati wrote to petitioner concerning his failure to file City of Cincinnati income tax returns for 1968 (R. 62-64). In March 1970, petitioner filed his Cincinnati income tax return for 1968 (Govt. Ex. 6). The following month petitioner applied for an extension of time for the filing of his 1969 federal tax return (R. 68), in which he again falsely stated that his returns for the three preceding years had been timely filed, even though his 1968 federal return had not then been filed (R. 68; Govt. Ex. 4). The Service granted petitioner an extension to May 30, 1970.

In October and November 1970, the City of Cincinnati wrote to petitioner and requested that he file his delinquent 1969 city income tax returns (R. 74-75). In January 1971, the Internal Revenue Service received an anonymous phone call that petitioner had not filed his 1968 and 1969 federal income tax returns (Tr. 49-50). Shortly thereafter, an investigation was commenced, and on February 18, 1971, petitioner filed the delinquent federal returns (Tr. 4-5; Govt. Exs. 1, 2).

At trial, petitioner testified that his failure to file the returns on time was not due to carelessness or because he was too busy to file them, as he had stated on his extension requests, but because he had had domestic and financial problems (R. 50).

1. Petitioner contends (Pet. 8-17) that the indictment incorrectly stated the dates when his tax returns were due to be filed and that the error was not cured by a bill of particulars subsequently agreed to by counsel. The pertinent facts are as follows:

In August 1973, the indictment was returned, charging that petitioner was required by law to make an income tax return on or before April 15 of 1969 and 1970, and that he willfully failed to make the returns. However, the April 15 dates set forth in the indictment were erroneous because in each year petitioner had been granted an extension of time within which to file his return until May 31 and 30, respectively. When the error was brought to the attention of the court and defense counsel before trial on September 17, 1973, it was agreed by defense counsel at a conference in chambers that a bill of particulars would correct the error (Pet. App. 1a-2a).

Petitioner argues (Pet. 8-17), as he did in the court of appeals, that the error in the indictment could not be cured by a bill of particulars, so that the indictment was fatally defective and must be dismissed. The court of appeals agreed that the indictment could not be amended by a bill of particulars, and further held that the agreement of counsel did not constitute a waiver of indictment because it was not made by the defendant in open court as required by Rule 7(b) of the Federal Rules of Criminal Procedure (Pet. App. 2a-4a). Nevertheless, it affirmed petitioner's conviction on the ground that the error in the indictment and its amendment by a bill of particulars did

"not affect substantial rights" under Rule 52(a) of the Federal Rules of Criminal Procedure and therefore must be disregarded (Pet. App. 4a-7a).

The court of appeals correctly concluded that the mistakes in the dates set forth in the indictment were harmless error.[2] The pertinent part of its opinion states (Pet. App. 7a):

> In this case, the defendant has failed to identify any substantial rights affected by the amendment. It is apparent from this record that the defendant, himself an attorney, at all times knew that the date appearing in the original indictment was erroneous. The defendant was made aware in sufficient time prior to trial that the extended date for filing would be used. Moreover, the defendant, having consented to the filing of the bill of particulars, may not now assert surprise. Additionally, the defendant has not identified any evidence that the prosecutor may have gained through a grand jury proceeding not otherwise available from other sources. Nor can we find from this record any substantial likelihood that the jury's verdict was influenced by its awareness that an indictment had been returned by an impartial grand jury. * * *

In so holding, the court of appeals acknowledged (Pet. App. 3a-4a) that only the grand jury may amend an indictment with respect to a matter of substance (*Ex parte Bain*, 121 U.S. 1; *Stirone* v. *United States*, 361 U.S. 212), and that the dates set forth in the indictment were matters

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[2]Since petitioner's tax returns which were due on their extended filing dates in May, 1969, and May, 1970, were not filed until after the Treasury agents' investigation began in 1971, there is no substance to his argument (Pet. 15-16) that the grand jury might not have indicted had it known the correct due dates.

of substance. But that error does not call for reversal in a case where, as here, the offense was a misdemeanor and could have been charged in an information rather than an indictment and there was no showing that either petitioner or the jury was misled by the mistaken dates. Since petitioner had no right to have his case initially considered by the grand jury, the amendment of the indictment by means of a bill of particulars to which he originally agreed did not affect any of his substantial rights.[3]

Petitioner contends (Pet. 8) and the court of appeals correctly acknowledged (Pet. App. 4a) that the decision below conflicts with *United States* v. *Goldstein*, 502 F.2d 526 (C.A. 3) (*en banc*). There, the Third Circuit held that an indictment charging the misdemeanor of filing false income tax returns could not be amended by the district court to reflect the correct due dates of the returns. It recognized that because the misdemeanor charged could have been brought by information, an indictment was not constitutionally required (502 F.2d at 530), and that the defendant could not claim to have been prejudiced by lack of fair notice of the charge, or by a risk of reprosecution in the event of acquittal (502 F.2d at 529). Nevertheless it reasoned that because the government chose to proceed by indictment, the defendant's right to a determination of probable cause by an independent grand jury was infringed by amendment of the dates in the indictment.

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[3]Contrary to petitioner's argument (Pet. 14), the mistake in the dates set forth in the indictment did not constitute a jurisdictional defect. Unlike this case, *Stirone* v. *United States*, 361 U.S. 212 (Pet. 14), involved a prosecution where the indictment charged interference with the importation of sand and the jury convicted the defendant of interference with the exportation of steel, a completely different offense. Here, however, there is no question that the indictment charged the correct offense of willful failure to file timely income tax returns.

Silber v. *United States*, 370 U.S. 717 (Pet. 14), is similarly distinguishable. There, the indictment omitted an essential element of the

But as the court of appeals here held and the three dissenting judges in *Goldstein* argued (502 F.2d at 531-535), a rule requiring automatic dismissal of an amended indictment in a case that could have been brought by information is an inappropriate sanction where no prejudice to the defendant has been shown. The fact that the government brought an indictment even though an information would have sufficed should not preclude the court from inquiring whether any possible prejudice arose from the amendment of the indictment so as to have deprived the defendant of a fair trial.

Moreover, the mistake in the dates in the indictment in both this case and in *Goldstein* and their respective amendment by a bill of particulars or by the court did not violate the defendants' rights under the Sixth Amendment to fair notice of the criminal charges against them, or the Double Jeopardy Clause of the Fifth Amendment. Thus, petitioner has not been denied any "rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman* v. *California*, 386 U.S. 18, 23.

In such circumstances we submit that the decision in *Goldstein* is unsound. It wastes both time and legal resources by requiring the prosecution to begin anew in order to correct a harmless error. Apart from this, the *Goldstein* approach appears to have little practical impact since, we assume, a case like this can always be promptly reinitiated by an information drawn in terms of the indictment, with the correct dates, should a district court

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offense and could not be cured by a bill of particulars because Congress provided that the prosecution at issue could only proceed upon an indictment. See *Russell* v. *United States*, 369 U.S. 749, 766-771. As the court of appeals observed, this Court in *Silber* adopted a *per se* rule requiring dismissal of a defective indictment to protect the statutory right to an indictment applicable in that case (Pet. App. 5a).

refuse to permit amendment.[4] Accordingly, while *Goldstein* was incorrectly decided and the court below properly refused to follow it, the issue does not presently appear to be of sufficient importance to warrant review by this Court to resolve the conflict among the circuits.[5]

2. Petitioner furthers argues (Pet. 17-22) that he should have been granted a new trial on the ground of newly discovered evidence that Rev. Neely falsely testified (as a government rebuttal witness) that petitioner's reputation was not good and identified some of the persons he had talked to about petitioner (R. 116-122). In denying the motion for a new trial, the district court correctly concluded that the alleged untrue statements of Rev. Neely were collateral and not material to the main issue, and indicated further that it was not satisfied that Neely's testimony was untrue (R. 30). Thus this case lacks the basic requirement for granting a new trial in this situation that "[t]he court is reasonably well satisfied that the testimony given by a material witness is false" (*Larrison* v. *United States*, 24 F.2d 82, 87 (C.A. 7)).

As the court of appeals correctly held (Pet. App. 8a), a motion for a new trial based on newly discovered evidence is addressed to the sound discretion of the district court. See, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106; *United States* v. *Crowder*, 351 F.2d 101 (C.A. 6). Given

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[4]Even where a felony charge is involved, amendments or withdrawals which do not affect substantial rights protected by the Constitution's requirement for a grand jury are permitted where the effect is to narrow the charges against the defendant or to eliminate surplusage. See *United States* v. *Dawson*, 516 F.2d 796 (C.A. 9), certiorari denied, No. 74-6623, October 6, 1975.

[5]The Third Circuit's decision in *Goldstein* is not of constitutional dimensions. See *United States ex rel. Wojtycha* v. *Hopkins*, 517 F.2d 420, 425 (C.A. 3) (state indictment in case that could have been brought by information may be amended).

the peripheral character of the impeachment testimony at issue, the district court did not abuse its discretion. See *Mesarosh* v. *United States*, 352 U.S. 1, 9.

3. Petitioner also contends (Pet. 22-23) that the trial court's charge to the jury on the element of willfulness did not conform with *United States* v. *Bishop*, 412 U.S. 346. The charge is as follows (R. 128-129):

> *** [A] failure to act is willful if it is voluntary, purposeful, deliberate and with specific intent to fail to do what the law requires.
>
> * * * * *
>
> In order for an act or failure to act to be willful it must be done with a bad purpose to disobey or disregard the law. The only bad purpose necessary for the government to prove in this case is the deliberate—and we are going to repeat that word "deliberate"—intention not to file the returns which the defendant knew he was required to file at the time he was required to file them.
>
> Now, a couple more abstract, and then I am sure your concrete question. We have used the term "deliberate" and we have used the term "specific intent."
>
> The government is required to prove that this omission, if any, was deliberate or with a specific intent. Now, specific intent means that something was done voluntarily; it was done intentionally and not by reason of mistake; * * * .

This instruction accords with *Bishop*, which defined willfulness in terms of a "voluntary, intentional violation of a known legal duty" (412 U.S. at 360).

Petitioner argues (Pet. 22-23) that the trial court erred in not instructing the jury that "willfulness" required an "evil motive." While the Court in *Bishop* referred to its prior formulation of willfulness as "bad faith or evil intent" (*United States* v. *Murdock*, 290 U.S. 389, 398), it is well established that it is not necessary for a trial court to use the particular phrase "evil motive" in charging the jury. See, *e.g.*, *United States* v. *Hawk*, 497 F.2d 365, 366-367, n.2, 369 (C.A. 9), certiorari denied, 419 U.S. 838; *Cooley* v. *United States*, 501 F.2d 1249, 1253, n. 4 (C.A. 9), certiorari denied, 419 U.S. 1123; *United States* v. *McCorkle*, 511 F.2d 482, 485 (C.A. 7); *United States* v. *Pohlman*, 522 F.2d 974, 976-977 (C.A. 8) (*en banc*), certiorari denied, No. 75-483, January 12, 1976. The trial court's definition of "willful" fullfills the intent of Congress "to construct penalties that separate the purposeful tax violator from the wellmeaning, but easily confused, mass of taxpayers." *United States* v. *Bishop*, *supra*, 412 U.S. at 361.

4. Finally, petitioner argues (Pet. 24-28) that the district court erroneously excluded evidence that an employee of the Internal Revenue Service thought that he was accountable for no more than the civil tax liabilities for the years at issue. Petitioner sought to introduce the evidence to establish that he was not guilty of the criminal offense of failure to file tax returns. But such evidence is not probative of innocence and was properly excluded. As the court of appeals correctly held (Pet. App. 8a), evidence of inconsistent statements by a government agent may not be introduced to prove the truth of the statements. See, *e.g.*, *United States* v. *Santos*, 372 F.2d 177 (C.A. 2); *United States* v. *Powers*, 467 F.2d 1089 (C.A. 7).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.